



Introduction to Land Use Planning Law

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Course Overview

- ◆ Introduction to Course
- ◆ Introduction to Land Use Planning Law



Course Intro

- ◆ Grades – One Final Exam
- ◆ 25 to 50 multiple choice questions
- ◆ 2 essay questions
- ◆ Open book and open notes
- ◆ Optional review session of 2 hours
- ◆ 2 short quizzes during the course



Course Intro

- ◆ Grades – Elective Paper
- ◆ 10 pages on an approved land use topic
- ◆ If interested, speak with instructor
- ◆ Due on date of final exam



Class Text

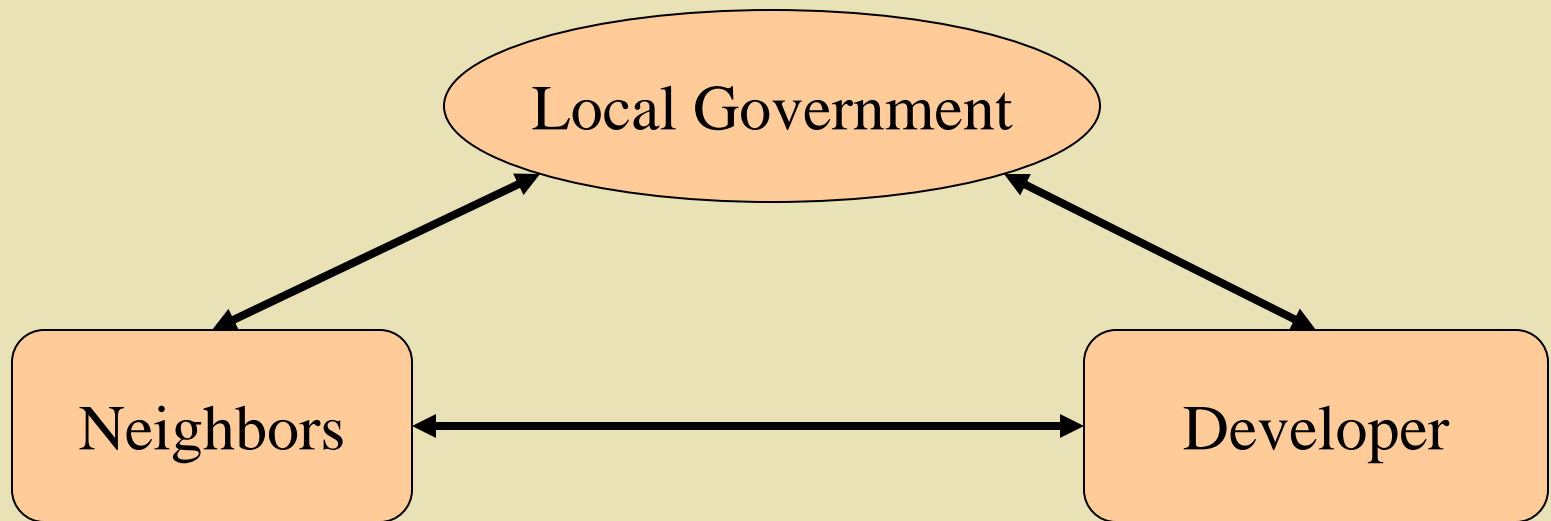
- ◆ Land Use Law: Tennessee & Beyond
- ◆ Mandelker, Land Planning Law (Lexis, 5th Ed., 2003) Optional
- ◆ Check out Mandelker's web site at
- ◆ law.wustl.edu/landuselaw/right.html



Internet

- ◆ tnlanduse.com
- ◆ findlaw.com
- ◆ Metro Zoning Ordinance
- ◆ Metro Subdivision Regulations
- ◆ Columbia Zoning Ordinance

The Trinity of Litigants





What is land use planning law?

- ◆ A series of interconnected regulations which limit the way in which real property can be developed & utilized
- ◆ What are its purposes?
 - Orderly development of local communities
 - Separate incompatible uses



Typical Zoning Ordinance

- ◆ Use Regulations
 - Principal and Accessory
- ◆ Bulk Regulations
 - Side, front, rear yards; FAR; height, and so on
- ◆ Administrative Procedures
 - Variance, CUP, NCFP
- ◆ Adoption of Ordinance and General Plan



Dillon's Rule

- ◆ Local government only has those powers expressly given it or those necessarily implied
- ◆ Very important from land use standpoint
- ◆ Are PUDs statutorily provided for?
- ◆ Site plan review: ultra vires the enabling legislation?



Different Statutory Bases

- ◆ County & municipal zoning
 - TCA § 13-7-101, 201
- ◆ County & municipal planning
 - TCA § 13-3-101, 401
- ◆ Private enabling legislation



Examples of Ordinances

- ◆ Metro Zoning Ordinance
- ◆ Columbia Zoning Ordinance
- ◆ Metro Zoning Board
- ◆ Metro Planning Commission

Conclusion



Land Use Planning

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Review Last Class

- Land use and zoning: controlled by statute and ordinance
 - Must comply with both
 - If not, likely to be struck down
- Dillon's Rule: city/county has not authority to adopt zoning except in conformity with the state given legislation

This Class

- Lightman
- Euclid
- Grant
- Fallin
- Fasano
- McCallen

Lightman (Tenn. 1933)

- Text at 9
- What's a writ of mandamus?
- Ordinance 836 authorized by Charter?
- Private Acts 1925, Ch 209
- The Zoning [Planning] Commission

Lightman

- No final report before ordinance passed
- Some other cases:
- Southern Constructors: Dillon's Rule
- Wilgus: minor changes to pending bill ok
- Westland West: major changes to pending bill not ok!

Euclid (US S Ct 1926)

- Text at 30
- First big national test for zoning
- Trial court found ZO unconstitutional
- FMV \$10K Industrial; only \$2.5K res
- Due process challenge/takings
- If the validity is fairly debatable, act stands

Euclid

- What type of challenge?
- What do you make of the language at middle of p.43
- Bettman's involvement
- Nectow v. Cambridge (1928)(text at 46)
- Spencer-Sturla (Tenn. 1927)

Grant (Tenn. 1954)

- Text at 48; what statutory authority?
- Zoning change from Res C to Comm A
- Planning Comm said it was spot zoning
- Trial court holds ordinance unconst
- No general scheme or plan
- Clearly only helps one person
- What is spot zoning?

Grant

- How small does the lot have to be?
- How homogenous the surrounding area?
- What does a comprehensive plan have to do with any of this?
- Was there any rational basis for the change?

Fallin (Tenn. 1983)

- Text at 53; what statutory authority?
- 10.6 acres; Ag to Res B (275 apts)
- Surrounding property is Ag or Res A
- How did the suit get filed?
- What's the difference between cert and declaratory judgment?
- 10 acres too big a spot?

Fasano (Or. 1973)

- Text at 62
- AGS owns 32 acres seeking a PUD
 - Mobile home park is proposed
- What is a PUD?
- Surrounding property is SFR
- Challenge to zoning change; writ of review
- Trial Ct reversed the LLB
- Court of Appeals & S Ct affirm

Fasano

- Trial court found:
 - No change in the neighborhood
 - No consistency with plan
- LLB argues:
 - Presumptively valid
 - Change of conditions not needed
 - Consistent with plan

Fasano

- Issues:
 - What's the legal standard?
 - Who has the burden of proof?
 - What's the standard of review?

Fasano

- Are all zoning changes legislative as opposed to administrative?
 - If the decision applies to one small parcel, is that legislative?
 - If the decision outlines a general policy applicable to a group of properties, is that legislative?

Fasano

- Standard of review is judicial (not legislative)
- Burden of proof: on the applicant
- Legal standard: must prove consistency with the plan

Fasano

- Procedural Implications: (Text at 71)
 - Notice & opportunity to be heard
 - Impartial tribunal
 - No pre-hearing or ex parte contacts
 - Record with adequate findings of fact
- Note the concurring opinion
 - Cumbersome process, high cost

McCallen

- Text at 74; what statutory authority?
- Cert vs Declaratory Judgment
 - If any possible reasons supports the decision, it will be upheld.
- Statutory cert vs common law cert
- Planned development
- Aren't PUDs always spot zones?
- Contract zoning?

Conclusion

Next Class

Land Use Law

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Review Last Class

- Lightman: obey the statutes
- Euclid: rational basis test
- Grant: spot zoning
- Fallin: rational basis in Tenn
- Fasano: admin v legis act
- McCallen: PUDs in Tenn
- What are PUDs?

This Class:

- First English
- Lingle
- Ch 3 Intro
- Howe Realty
- Estoppel
- Vested Rts
- Westchester



First English (1987)

- Text at 92
- Background: important case concerning overly intense zoning
- What's the procedural status in this case?
- What was the Cal ruling in Agins?
- Total take works a condemnation



First English

- On remand, the Cal Ct Apps ruled that the complaint failed to state a cause of action; the ordinance subst advanced a legitimate state purpose and did not deny all use of the property.



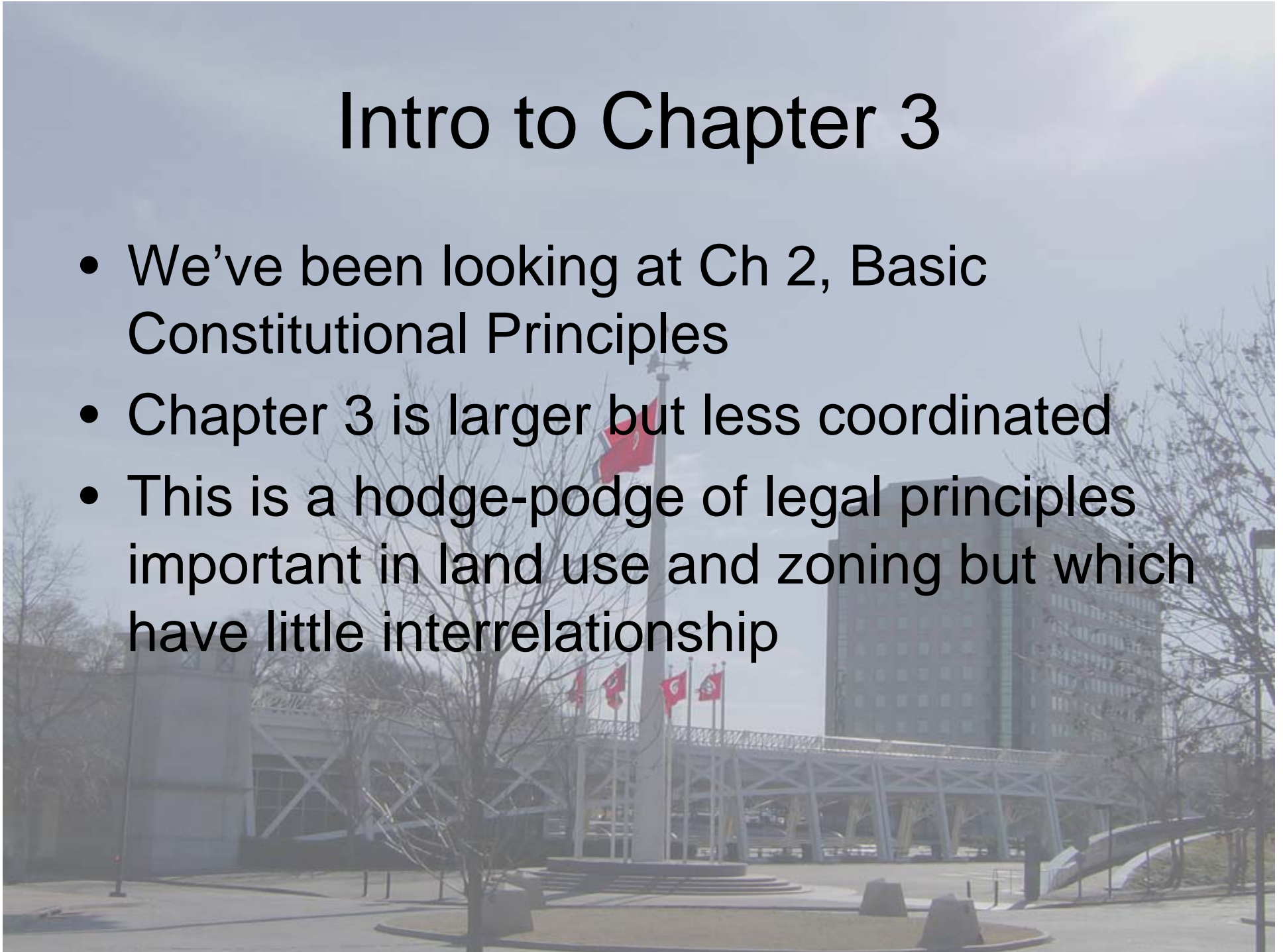
Lingle (2005)

- Text at 117; Agins again!
- Good summary of Takings law
- The substantially advance language
- 3 areas:
 - Physical invasion -- Loretto
 - Total deprivation – Lucas v SC
 - Penn Central factors
 - Economic impact -investment backed expectations
 - Physical invasion v regulation



Intro to Chapter 3

- We've been looking at Ch 2, Basic Constitutional Principles
- Chapter 3 is larger but less coordinated
- This is a hodge-podge of legal principles important in land use and zoning but which have little interrelationship



Estoppel & Vested Rights

- When should the government be prevented from revoking a permit previously issued?
- When can the government be prevented? Almost never!
- What's the difference between estoppel and vested rights?



Climbing the Flagpole





Howe Realty (1940)

- Text at 133
- S/E corner of 21st & West End
- 1933 Res C District
- 1937 Comm B District
- Aug 1939 changed back
(while the case is pending)
- Gasoline service station







Howe Realty

Permit is not a contract

Once issued, may be protected.

Must show:

1. Legally issued building permit
2. substantial construction

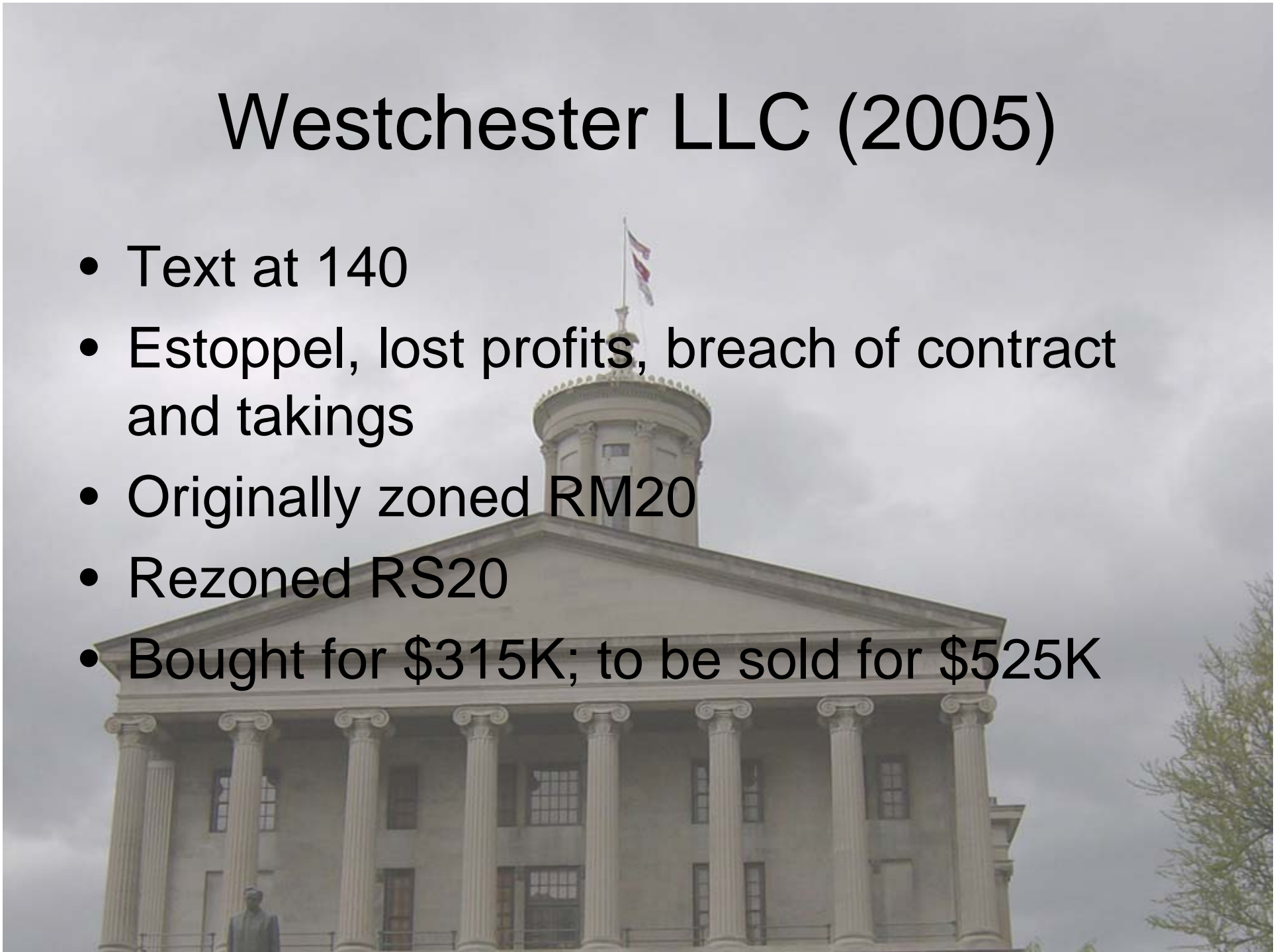
Howe Realty

- MetZo – 17.04.030(A)(1)
- Any permit issued before the effective date of this zoning code or subsequent amendment shall remain in effect provided that construction is begun within six months from the date of issuance of the permit. Construction shall mean physical improvements such as, but not limited to, water and sewer lines, footings, and/or foundations have been developed on the site. Clearing, grading, the storage of building materials, or the placement of temporary structures shall not constitute beginning construction.



Westchester LLC (2005)

- Text at 140
- Estoppel, lost profits, breach of contract and takings
- Originally zoned RM20
- Rezoned RS20
- Bought for \$315K; to be sold for \$525K



Westchester

- Checked with codes about the zoning
- Zoning change doesn't take all use
- Substantial construction/liabilities: must relate directly to construction
 - Here, threat of suit not sufficient
- Good faith reliance on administrative opinions not enough

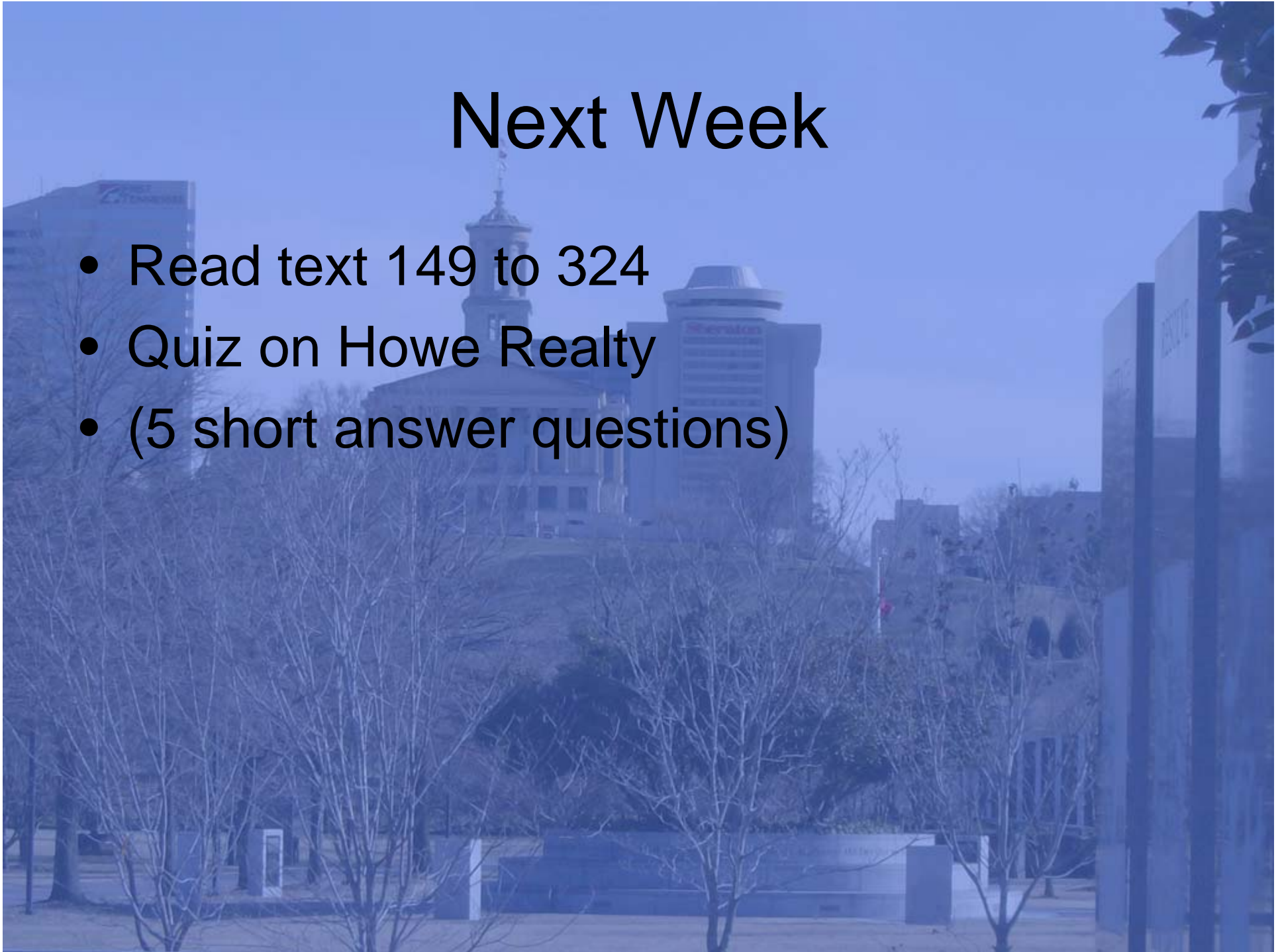
Illegal Permit

- Any change in result?
- No! Illegal permit gives the holder nothing
- Bright line rule: rules in effect at time of completed application apply regardless of later changes

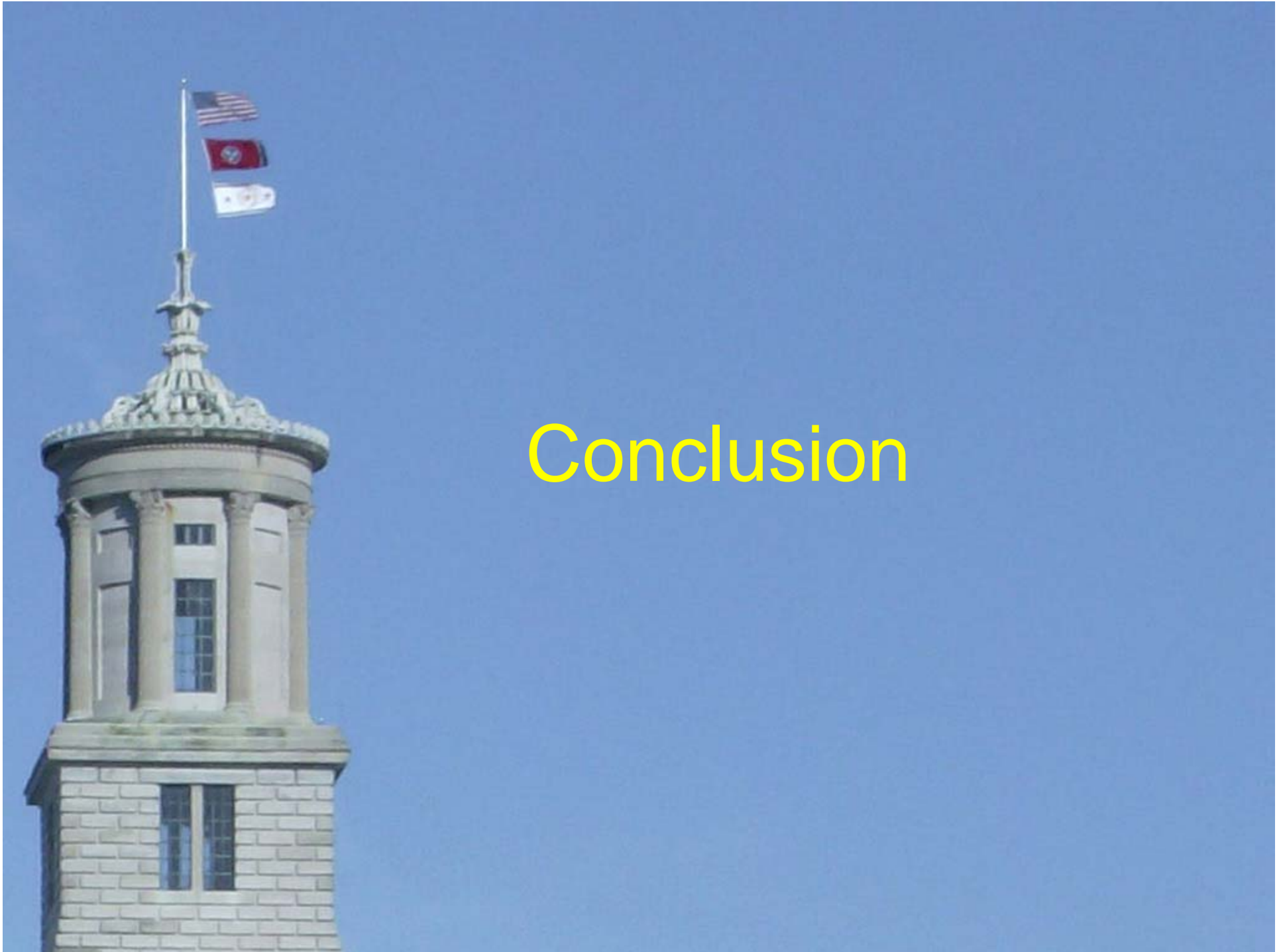


Next Week

- Read text 149 to 324
- Quiz on Howe Realty
- (5 short answer questions)



Conclusion



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Review Last Class

- Takings Law
 - First English
 - Lingle
- Vested Rights/Estoppel
 - Howe Realty
 - Westchester LLC





This class

- Pending Legislation
- Intergovernmental Immunity
- Contract & Conditional Zoning
- Historic Zoning

Pending Legislation Doctrine

- Harding Academy v Metro Gov't
- S C of Tenn; Text at 149
- 9 demo permits issued but revoked
- ZC pending for historic zoning
- What is the PLD?
- How far along must the bill be?
- Is the PLC really necessary?
- See Text at 153



Intergovernmental Immunity

- HVUD v Metro Gov't
- Text at 160
- “Unless specifically provided otherwise, a city’s zoning power does not extend to state government instrumentalities located within its borders.”



Intergov'tal Immunity

- City vs county
- City vs feds
- City vs state
- This doctrine is not well recognized
- Mandatory referral provisions



Contract & Conditional Zoning

- O'Dell v Johnson City (1995)
- Text at 162
- Bilateral Negotiations v unilateral conditions
- In this case no negotiations
- Browning dictated the terms of the zoning change
- The city didn't budge one bit!
- But then there is not contract!

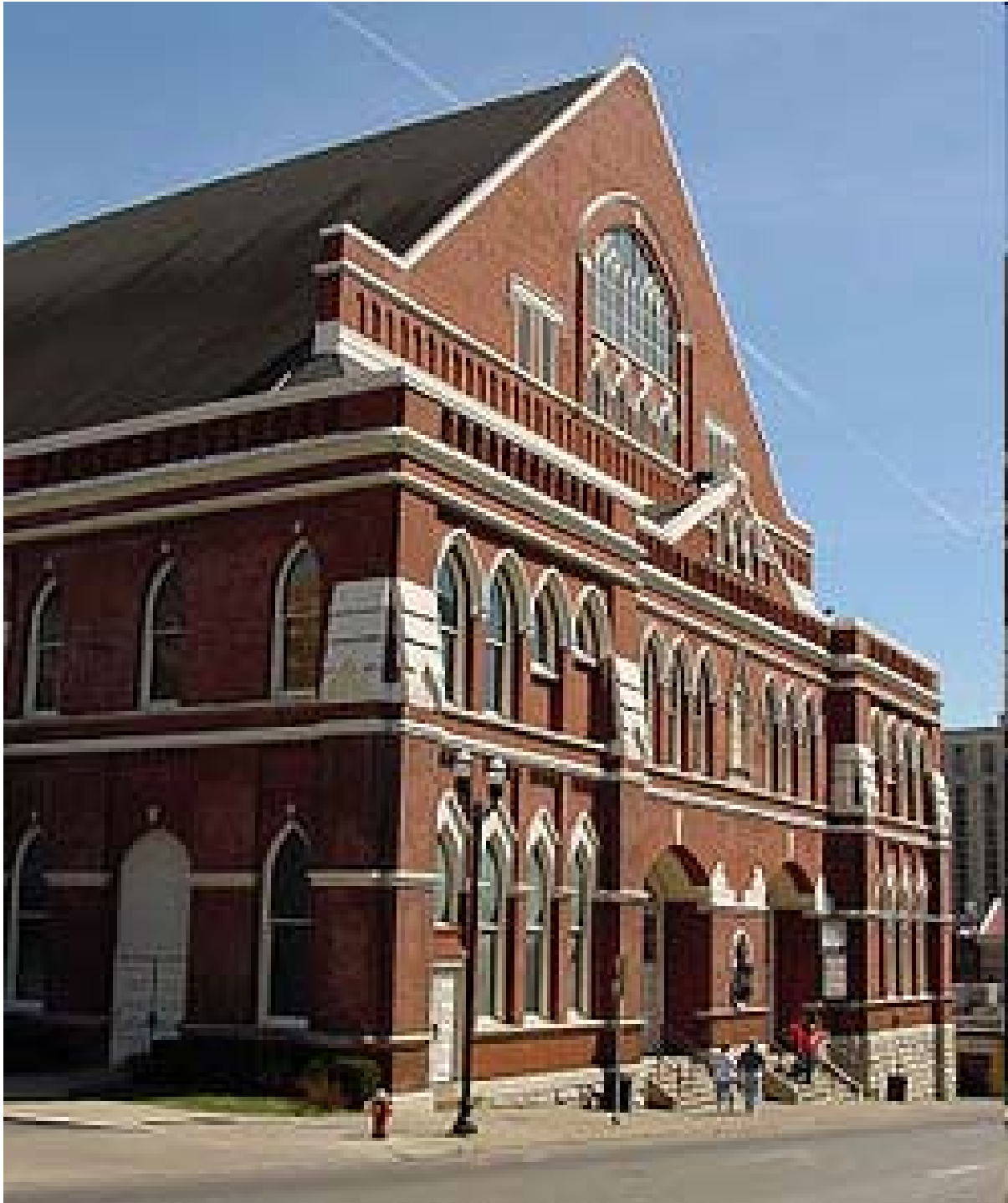
Contract Zoning

- Why is contract zoning bad?
- If terms are unilateral, then it is conditional zoning
- If terms are bilateral (negotiated), then it is contract zoning and illegal in Tennessee
- Aren't PUDs contract zoning?
- How about the Tenn Code Ann, text 173. How can it be ok only in Chattanooga?

Historic Zoning

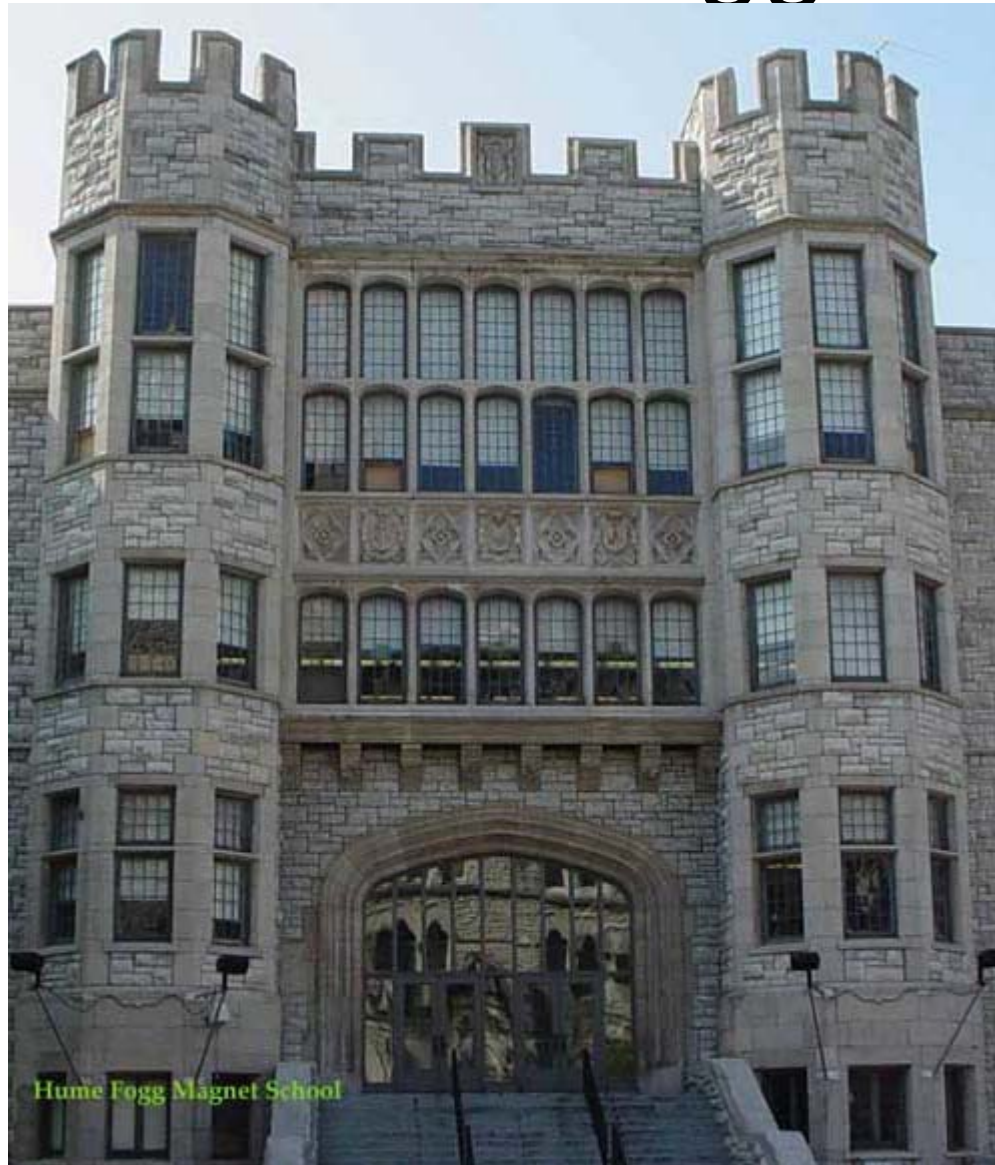
- National Register of Historic Places
- 16 USC § 470
- Federal database of places deemed worthy of preservation
- Many times the listed places are given local zoning protection





Ryman
Auditorium

Hume Fogg



Shelby Street Bridge



West End Middle School



Sunnyside





Local Historic Zoning

- A landmark or district is nominated
- Reviewed by staff and MPC
- Council must pass
- Regs adopted to implement the policies
- Prevents demolition (p 175)

TDRs

A faded background image of a tall, ornate clock tower. The tower has a clock face visible and is topped with a statue of a figure with arms raised. The image is semi-transparent, allowing the text to be overlaid.

- Fred French (NY 1976)
- Text at 178
- Declaratory judgment action challenging NY zoning law requiring 2 private parks to become public in return for TDRs
- What is a TDR?
- Court says law takes all use of the land
- Is that a deprivation of due process?

Tudor City



French

- What caused the law to pass?
 - Sale to new owners
 - Proposed new tower or 2 towers on park property
- Immediate adverse public reaction
- What does the Court think of the TDRs?



French

- No physical invasion (really?)
- Just significant drop in value
- That's unconstitutional
- TDRs don't help
- Too much uncertainty
- How well would TDRs work in Nashville?

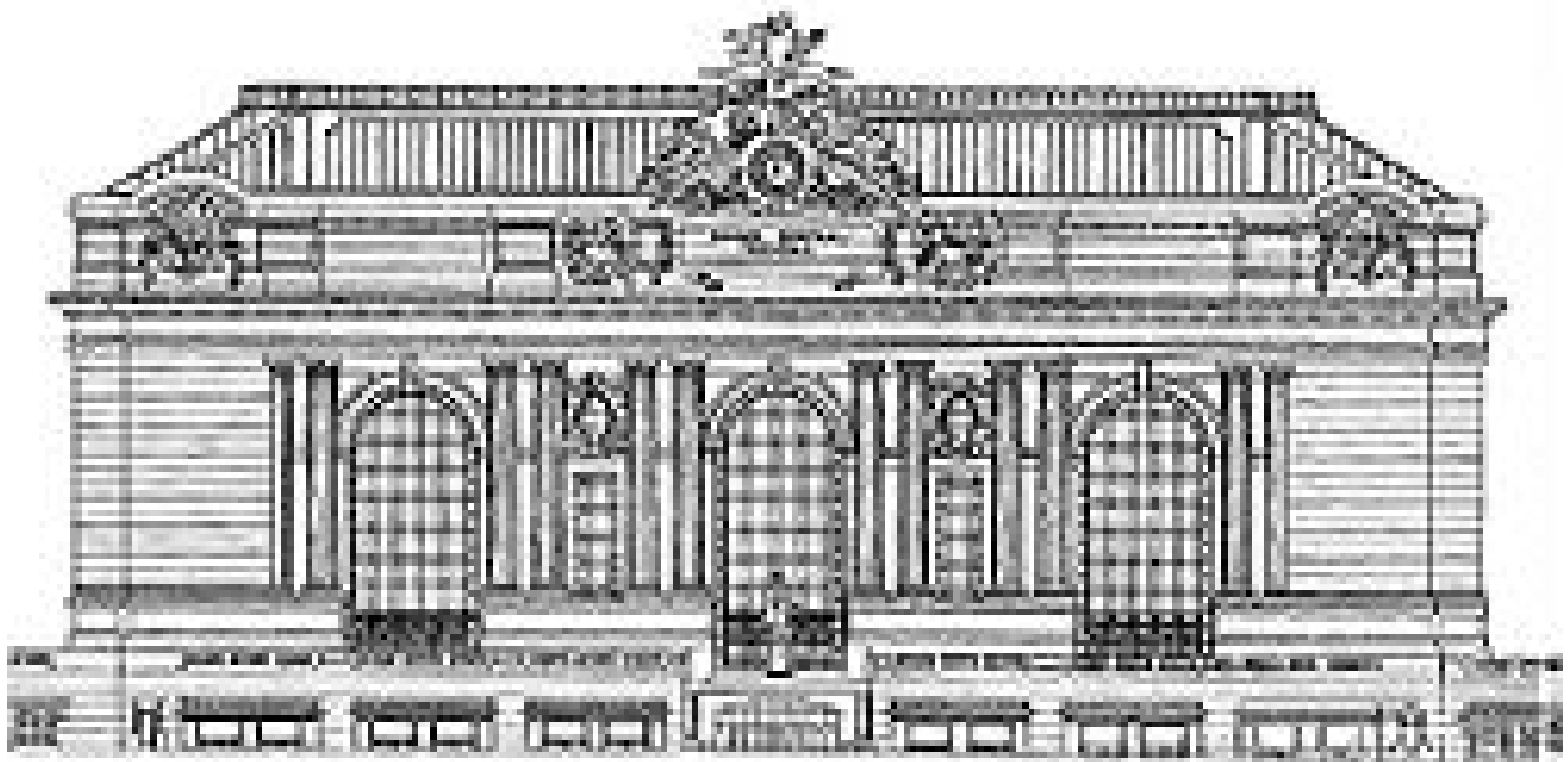


Penn Central (US 1978)

- Text at 189; Historic zoning & TDRs
- Grand Central Terminal in NYC
- 42nd Street and Park Avenue
- Designated landmark in 1967
- Applications for office on top



Grand Central



GRAND CENTRAL TERMINAL - NEW YORK

Grand Central



Grand Central -- detail





Breuer I (55 stories)
20 story tower was
part of original design

Penn Central



- Quite simply the tower would overwhelm the terminal . . .
- The addition would be four times as high . . .
- Text at 195



Penn Central

- Review NY's law; text 191-2
- Commission denied application
- Owners file suit for a take
- Trial court granted inj and dec
- Severed issue of takings
- App Div reversed
- NY Ct Apps affirmed

Penn Central

- Rejected any claim of a take
- Text at 197



Penn Central

- US S Ct: text at 198-9
- Two issues: is it a take? TDRs enough?
- This is an ad hoc process
- Economic impact, esp on investment backed expectations
- Physical invasion v public regulation

Penn Central

- Present use of the terminal remains as it has been for 65 years
- That's the primary expectation for use
- Also, smaller office extension might be approved
- And also rights may be transferred to other nearby properties
- No constitutional violation

Penn Central: Dissent

- Landmark law not typical zoning
- Multi-million dollar loss
- This is a subst loss and is a take
- TDRs may not compensate; remand

Next Week

- Read text 288 – 346
- Scurlock
- Edmonds
- Living Water Church





Conclusion

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Review Last Class

- Harding Academy
- HVUD v Metro
- O'Dell v Johnson City
- Fred French
- Penn Central





Tonight's Class

- Exclusionary Zoning
 - Fair Housing Act of '68
 - 42 § USC 3601
- Telecommunications
 - 47 § USC 151
 - TCA § 13-24-301



Exclusionary Zoning

- Dews v Sunnyvale
- 109 F. Supp. 2d 526 (ND Tex 2000); Text at page 219
- No apartments
- Minimum one acre residential lots

Dews

- 1965 Comprehensive Plan
 - Mandatory consistency
- 1971 Resolution banning apts
- 1973 One Acre ZO
- 1986 Plan Revision: comments at 230
- 1987 ZO Amendment (p. 232)
- Section 8 Housing
- 1993 Plan Revision (Robert Freilich) 241



Telecommunications

- Federal Act, 47 USC § 151
 - Does not preempt all other authority
 - But cannot unreasonably discriminate among providers
 - Cannot prohibit wireless service



Cellco

- Cellco v Franklin, KY
- What's the procedural status?
 - Different test here in Tennessee
 - Hannon v Alltel Publishing
- Lease to construct 307 ft tower
 - Always a popular land use



Cellco

- Application denied by Planning Comm
 - Visual impact & residential area
- Suit alleges decision not in writing as req'd by the FTCA, and no subst evidence
- And that 60 day rule violated and should be granted w/o delay
- This is much like an ordinary cert case in Tennessee
- Minutes approved on June 14, 2007

Cellco

- Federal standard on MSJ
- Celotext (text at 266)
 - Must show basis of motion
 - This may include lack of evidence supporting an essential element of claim
 - Opposing party must show specific facts demonstrating an issue for trial
 - Judge does not weigh the evidence
 - Decides if case must go to jury or if so one-sided that moving party prevails



Cellco

- Distinguish Tennessee standard
- Hannan v Alltel Publishing Co
- These cases clearly show that a moving party's burden of production in Tennessee differs from the federal burden.

Alltel

- In summary, in Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either:
 - (1) affirmatively negate an essential element of the nonmoving party's claim; or
 - (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

Cellco

- Back to Cellco
- Statute of Limitations: 30 days
- FTCA writing requirement– 47 USC 332
 - Separate from the written record
 - Describe the reasons for the denial
 - Explain the reasons to allow review
- Are minutes sufficient? Not separate from the written record

Cellco

- Was there subst evidence?
 - More than a scintilla
 - Enough that a reasonable mind would accept as adequate
- Basically, applicant's proof uncontradicted
- Aesthetics: general objections by lay witnesses not enough
 - Contra: VoiceStream; text 284
 - Towers already present



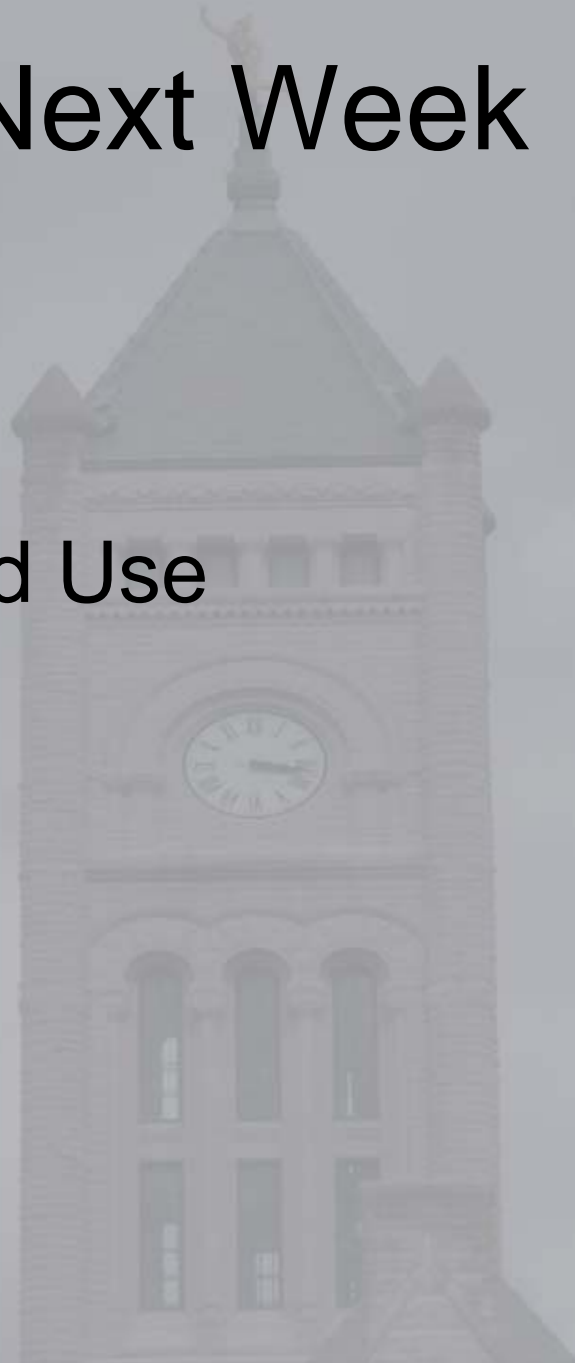
Cellco

- Residential Area
 - But ZO doesn't require denial; something more must be shown; but not done here.
- Aesthetics: general objections by lay witnesses not enough
 - Contra: VoiceStream; text 284
 - Towers already present
- Proper relief: require city to issue permit



Next Week

- Manf Housing
- Fair Housing
- Religious Land Use



A photograph of a classical building tower with a dome and flags against a blue sky. The tower is made of light-colored stone or brick, featuring a square base with a window, a cylindrical middle section with columns and windows, and a domed top with a decorative finial. Three flags are flying from a pole on top of the dome: the United States flag, a red flag with a white emblem, and a white flag with a red emblem. The background is a clear, solid blue sky.

Conclusion of Class 5

Go to [Class 6](#)

Land Use Law Class Six

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Review Last Class

- Dews v Sunnyvale
- Cellco



This Class:

- Scurlock v Lynn Haven
- TMHA v Metro Nashville
- Edmonds v Oxford House
- Living Water Church
- State Religious Restoration Act



Scurlock v Lynn Haven (p 288)

- Exclusion of mobile (manf) homes for failure to meet SBC
- Federal preemption
 - Quote on p. 291
- State Preemption
- Attorneys' Fees (is the CRA claim substantial?)



TMHA v Metro Nashville (303)

- Another exclusion of manf homes
- TCA 13-24-201



Edmonds v Oxford House

- Text at 313



Living Water Church (326)

- RLUIPA
- Perhaps one of the more conservative approaches
- Walking a thin line: tension between the free exercise and establishment clauses
 - Bottom of 336
- The framework at 337



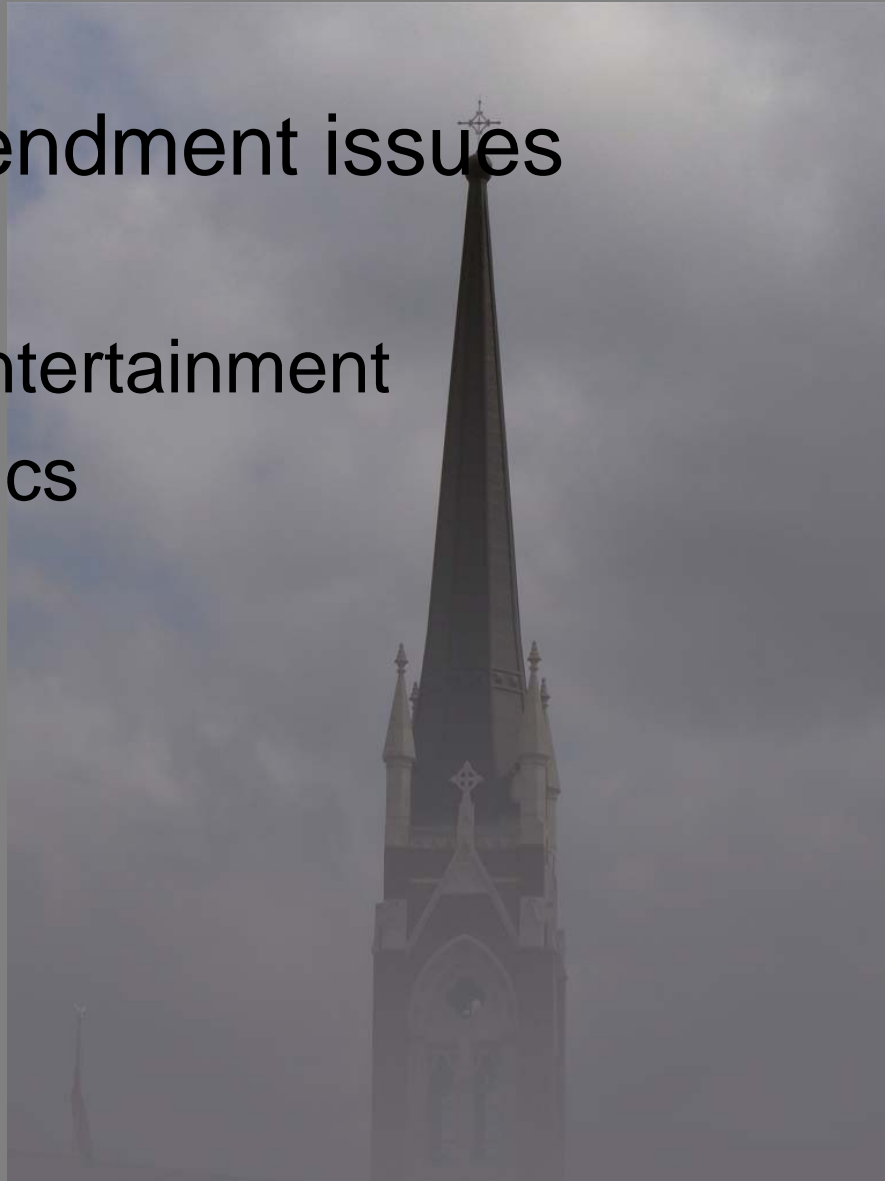
State Religious Land Use Act

- Passed in 2009
- TCA 4-1-407
 - “Substantially burden” means to inhibit or curtail religiously motivated practice.
- May have a greater impact than federal act here in Tennessee



Next Class

- First Amendment issues
 - Signs
 - Adult Entertainment
 - Aesthetics



A photograph of the Tennessee Supreme Court Building, a grand neoclassical structure with a portico supported by tall columns. The words "TENNESSEE SUPREME COURT" are inscribed on the pediment. A street lamp is visible in the foreground on the left.

Conclusion of Class 6

Class 7

Land Use Law Class Seven

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Review Last Class

- Manf & Fair Housing
- Religious Land Use issues





This Class: 1st Amendment

- Religion – we've discussed
- Signs – City of Ladue v Gilleo
- Adult Entertainment
 - Renton v Playtime Theaters
- Aesthetics
- SLAPP Act

Signs

- City of Ladue v Gilleo (p. 347)
- 2 x 3 ft sign: “Say No to the War”
- Broad based sign exclusion unconstitutional



Adult Entertainment

- Renton v Playtime Theaters (at 361)
- Time, place, and manner regulation
- Valid response to a serious problem (371)



Aesthetics & SLAPP



- Text at 380
- Majority rule: aesthetics may serve as a basis for police power regulation
- State of Tennessee v Smith, 618 SW 2d 474 (Tenn 1981)
 - Overrules Norris v Bradford, 321 SW 2d 543 (Tenn 1959)
- SLAPP (also at 380)
- Not sure how successful the Tenn act is.



Conclusion: Class Seven
Go to Class Eight

Land Use Law Class 8 Planning Commission

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Review Last Class

- First Amendment issues
Religion, signs, adult entertainment
and aesthetics



This class

- The Planning Commission
- General Plan - Barrett
- Subdivisions –
 - Thompson
 - B & B Enterprises
 - Sub Regs
- Nollan and Dolan



Planning Commission

- Council, Zoning Board and Planning Commission
- General Plan: new statute
 - But generally the plan is not critical
- Barrett v Shelby County (386)
 - Rezoning reversed based on the plan
 - S Ct finds no basis for reversal



Subdivisions

- Thompson v Metro (398)
- Definition of subdivision:
 - the division of a tract or parcel of land into two (2) or more lots, sites, or other divisions requiring new street or utility construction, or any division of less than five (5) acres, for the purpose, whether immediate or future, of sale or building development



Subdivisions

- If less than 5 acres, then always SD
- If more than 5 acres,
 - If street or utilities needed, then SD
 - If not, then no SD
- Equal protection – due process
- Equitable Estoppel



B & B Enterprises

- CL writ
- Challenge to denial of SD
- Was there any grounds at all to deny?
- How can the city protect against such results in the future?





Nollan & Dolan

- Nolan (at 428)
 - “Essential nexus”
- Dolan (at 439)
 - “Rough Proportionality”

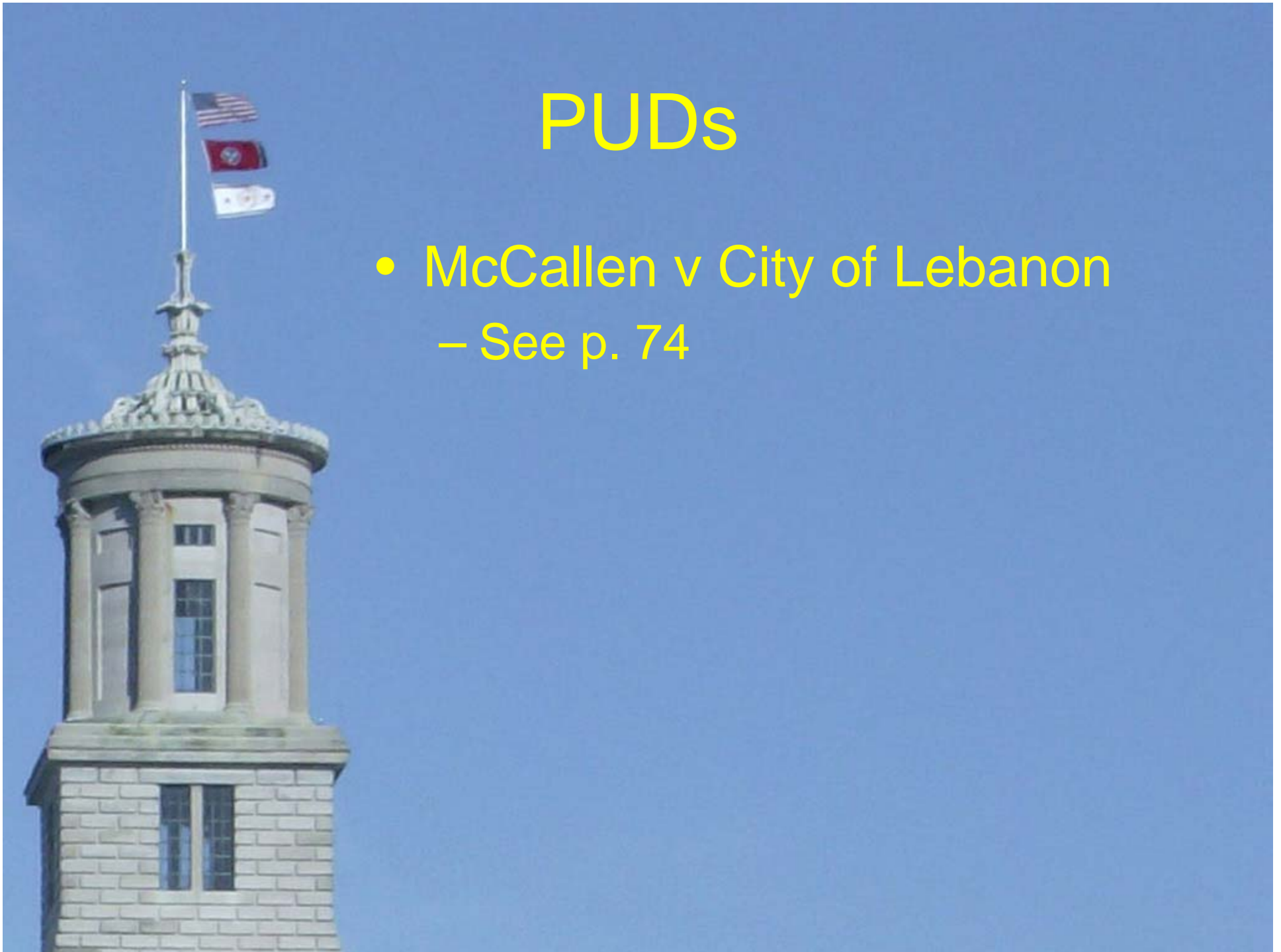


Site Plan Review

- Roten
 - SPR controls layout of development; onsite not off.
 - Court of Appeals rules that SPR is authorized in Tennessee

PUDs

- McCallen v City of Lebanon
– See p. 74



End of Class
Eight

Go to
[Class Nine](#)



Land Use Law

Class Nine: The BZA

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Review Last Class

- Planning Commission
 - Subregs
 - Nollan and Dolan



This Class

- The Zoning Board
 - Variances
 - Special Exceptions
 - Admin Appeals
 - NCFP
 - Principal & Accessory Uses
 - Procedure



Variances

- McClurkan
 - Variances do run with the land
 - But no exceptional physical feature justifying a variance



Special Exception

- Father Ryan
 - Broad public purpose language usually not helpful
 - Meet the conditions & permit should be granted



NCFP

- Important statute: 13-7-208
 - Does not apply to residential
- Rives
- Amortization
- Discontinuation



NCFP

- Capps v Metro
- City of Lebanon v Harris



MBZA Procedure

- Text at 520



[Go to Chapter 10](#)



Land Use Law

Chapter 10: Judicial Review

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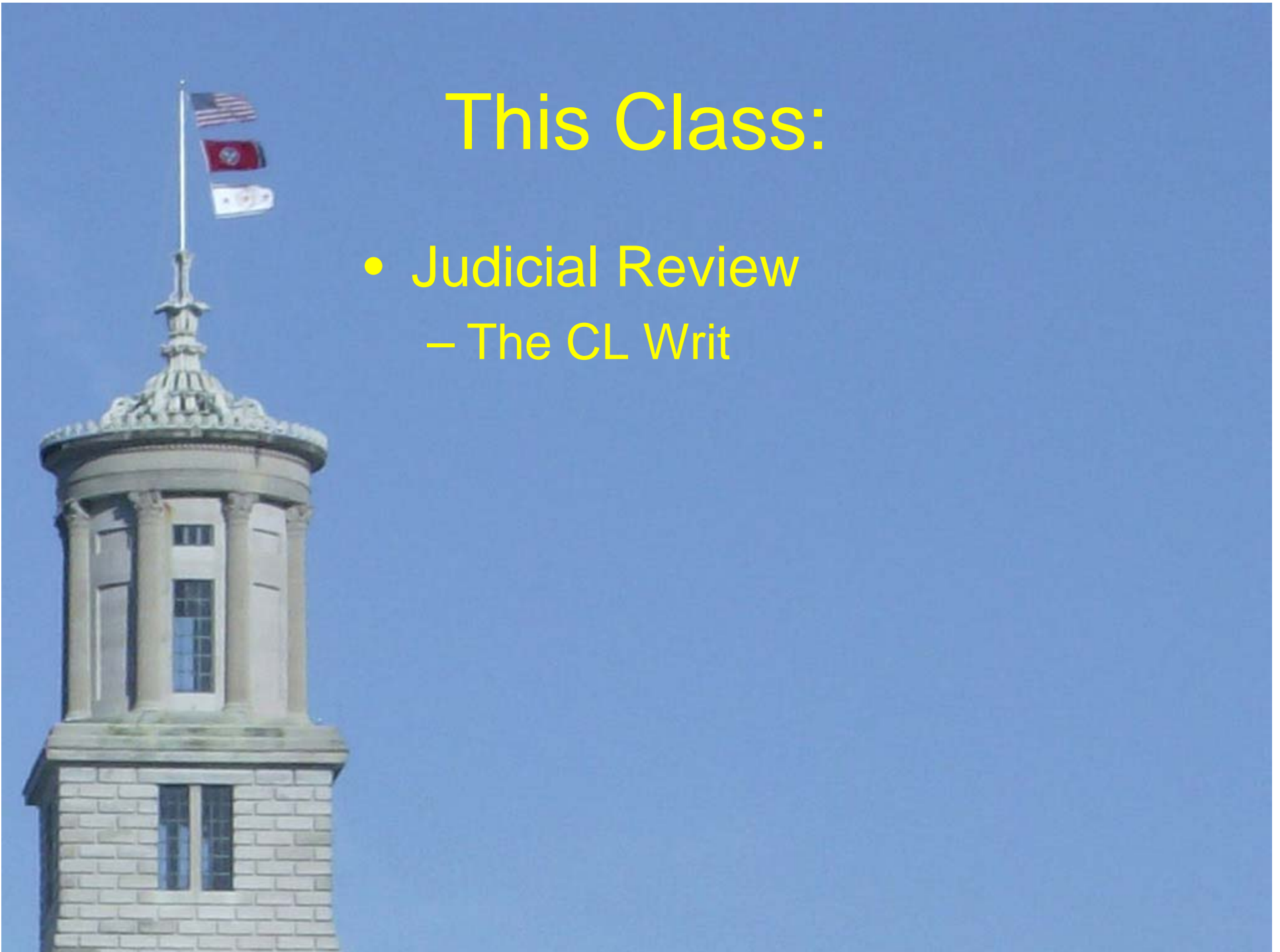
Review Last Class

- The Zoning Board
 - Variances
 - Special Exceptions
 - NCFP
 - Procedure



This Class:

- Judicial Review
 - The CL Writ



Technical Requirements

- Short explanation of suit
- Verification
- 1st app for extraordinary relief
- No other plain, speedy or adequate remedy
- Allege that petitioner is aggrieved
- Neighbor's case: standing
- Can't join with original action



More Technicalities

- Who to sue?
 - Levy
- When to sue?
 - Advanced Sales
- Where to sue?



Procedure

- Just like an appeal
- No new evidence
- Briefs filed
- Arguments of Counsel
- Decision must be supported by substantial evidence
- Must not be illegal, arbitrary or capricious



Conclusion

